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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 582

MILLARD GOODING, Warden
of the Richmond County,
Georgia Public Works Camp,
Appellant,

v.

JOHNNY C. WILSON,
Appellee.

On Appeal from the United States District Court
for the Northern District of Georgia
Atlanta Division

JURISDICTIONAL STATEMENT

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On Appeal from the United States District Court for the Northern District of Georgia Atlanta Division

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Georgia is at this time unreported. It is set forth in Appendix A, pp. 1a *et seq.*

JURISDICTION

This suit was originally commenced in the court below by a petition for a writ of habeas corpus pursuant

to 28 U.S.C. § 2241 *et seq.* seeking to set aside the appellee's State-court conviction. The judgment of the District Court was entered on July 8, 1969. A notice of appeal to the United States Court of Appeals was filed in the District Court on July 11, 1969, and this protective notice of appeal to this Court was filed in the District Court on July 17, 1969. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. § 1253.

The appellant has attempted to read *Mengelkock v. Industrial Welfare Com'n.*, U.S. , 21 L.Ed.2d 215 (1968) together with *Wilson v. City of Port Lavaca, Texas*, 391 U.S. 352 (1968), and *Schackman v. Arnebergh*, 387 U.S. 427 (1967) as holding that before a direct appeal to this Court is necessitated under 28 U.S.C. § 1253 there must be both (1) a case requiring a three-judge court for determination, and (2) a decision by a three-judge court. Unfortunately, this cannot be done with the requisite certainty necessary to avoid the filing of this protective appeal. The filing of such protective appeals is recommended by *Mengelkock v. Industrial Welfare Com'n., supra*, and approved by *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368 (1949).

QUESTIONS PRESENTED

1. Whether a final judgment adjudicating the unconstitutionality of a State criminal statute upon the ground that the statute is in conflict with the Constitution and staying the enforcement by State officials of said statute terminates a proceeding required by law to be decided by a three-judge district court where:

(a) The suit was commenced by an application for a writ of habeas corpus,

(b) No writ was ever granted,

(c) No return was ever had, and

(d) The only issue decided by the lower court was the constitutionality on its face of the State statute.

2. Whether a State statute proscribing the unprovoked use to or of another person, and in the other person's presence, of opprobrious words or abusive language tending to cause a breach of the peace is unconstitutional for vagueness and overbreadth.

3. Whether a State statute proscribing the unprovoked use to or of another person, and in the other person's presence, of opprobrious words or abusive language, and interpreted by the courts of the State as prohibiting opprobrious words and abusive language "likely to cause a breach of peace" or "which would naturally tend to cause a breach of peace under ordinary circumstances", is unconstitutionally vague and overbroad as interpreted by the courts of the State in question.

STATUTES INVOLVED

Georgia Code § 26-1409 (1933) and Ga. Code § 26-6303 (1933) are set forth in Appendix B, p. 1b.

STATEMENT OF THE CASE

Section 26-6303 of the Code of Georgia (1933) provides that:

"Any person who shall, without provocation, use

> to or of another, and in his presence, opprobrious words or abusive language, tending to cause a breach of the peace, or who shall, in like manner, use obscene and vulgar or profane language in the presence of a female, or any person who shall communicate to any virtuous female within this State by writing or printing any obscene or vulgar language or improper proposals, or by indecent or disorderly conduct in the presence of females on passenger cars, streetcars, or other places of like character, shall be guilty of a misdemeanor."

The appellee was convicted of the unprovoked use to another, in the other's presence, of opprobrious words or abusive language tending to cause a breach of the peace.

The petitioner's application set out, among other things, the following claim for relief:

> "5. Ga. Code Ann. § 26-6303, under which petitioner was convicted on counts 3 and 4 of the indictment is on its face unconstitutionally vague and overbroad in violation of the first amendment and due process clause of the fourteenth amendment, it failing to apprize persons with sufficient particularity of the conduct which is sought to be prohibited and, by its excessive breadth, prohibiting activity protected by the first amendment. . . .
>
> "6. Ga. Code Ann. § 26-6303 is unconstitutionally vague and overbroad in violation of the first amendment and due process and equal protection clauses of the fourteenth amendment as applied to petitioner in the following respects:
>
> (a) Neither the case law of the State of Georgia, the trial court, nor the Supreme Court of Georgia defined the words "opprobrious words or abusive language,' thereby leaving the determination of petitioner's guilt

> to the discretion fo (sic) the jury without adequate asfeguards (sic) of petitioner's due process right of notice or first amendment right of freedom of speech." Petition for Writ of Habeas Corpus, pp. 2-3, Record 2-3.

The court below construed the attack upon Ga. Code Ann. § 26-6303 a private, unofficial, copyrighted publication, as an attack upon the constitutionality of Ga. Code § 26-6303 (1933), and limited the scope of its inquiry to the facial constitutionality of this statute. (Order dated Mar. 4, 1969; Record 326-27). By order dated July 7 or 8, 1969, and entered July 8, 1969, the court below declared the criminal statute in question to be unconstitutionally vague and overly broad. (Record 364-71).

THE QUESTIONS ARE SUBSTANTIAL

1. A STATUTORY THREE-JUDGE FEDERAL COURT IS REQUIRED WHERE AN APPLICATION FOR A WRIT OF HABEAS CORPUS RAISES A SUBSTANTIAL QUESTION AS TO THE CONSTITUTIONALITY OF A STATE STATUTE AND SEEKS TO STAY THE ENFORCEMENT OF A SENTENCE BASED UPON A CONVICTION OBTAINED THEREUNDER.

The court below, upon determining that a substantial federal question existed as to the constitutionality of the state statute involved, failed to request the convening of a statutory, three-judge federal court as required by 28 U.S.C. § 2281 (1965 Ed.). As a result, the declaration of invalidity as adjudicated by the single-judge court is void for want of jurisdiction over the subject

matter. *Schneider v. Rusk, Secretary,* 372 U.S. 264 (1963); *Idlewild Bon Voyage Liquor Corp. v. Epstein,* 370 U.S. 713 (1962); *Stratton v. St. Louis Southwestern R.R.,* 282 U.S. 10 (1930).

The issue, as presented, is an open one. Careful research has failed to reveal any case beyond the district-court level where the applicability of the three-judge court to habeas-corpus applications has been directly considered. Even at the district-court level, the reported cases are sparse, and these are conflicting and otherwise confused. *United States v. York,* 281 F.Supp. 8 (D. Conn. 1968); *United States v. Warden of Wallkill Prison,* 246 F.Supp. 72 (S.D.N.Y. 1965), *aff'd per curiam,* 355 F.2d 208 (2nd Cir. 1966); *United States v. Myers,* 237 F.Supp. 682 (E.D. Pa. 1965); *United States v. Commonwealth of Pennsylvania,* 214 F.Supp. 913 (W.D. Pa. 1963); *United States v. Warden of Clinton Prison,* 29 F.Supp. 486 (N.D. N.Y. 1939), *aff'd* 108 F.2d 861 (2nd Cir. 1940).

United States v. Myers, supra, indicates that where a substantial question as to the constitutionality of a state statute is drawn in issue by an application for a writ of habeas corpus, a three-judge court will be required.

> "Since relator's allegations with regard to the application of the Pennsylvania Board of Parole Act to him do not, on their face and in the light of settled case law, present any substantial constitutional question, there is no necessity to convene a three-judge court under 28 U.S.C.A. § 2281 *et seq. Ex parte Poresky,* 290 U.S. 30, 54 F.Ct. 3, 78 L.Ed. 152 (1933); *Bell v. Waterfront Com-*

mission of New York Harbor, 279 F.2d 853 (2d Cir. 1960)." *Id.* at 684.

The clearest case containing an opinion to the contrary is *United States v. Commonwealth of Pennsylvania, supra;* however, the statement therein is *dicta* or, at best, an expressed alternative basis for sustaining the court's decision. In addition, the opinion also contains language which says the direct opposite of its stated *dicta.*

> ". . . [I]f a federal question is substantially raised by the relator, it would be incumbent upon this Court to have a statutory court convoked. Again by indirection, relator seeks to restrain officers of the State of Pennsylvania in the 'enforcement or execution of the Act of 1939' by which he was arrested, indicted, convicted and sentenced. . . . This provision [28 U.S.C.A. § 2281] does not require three judges to pass upon the initial question of jurisdiction. The existence of a substantial question of constitutionality must be determined from the allegations of the complaint. It is incumbent upon the trial judge to determine in the first instance whether a case is one requiring disposition by a federal court convened in accordance with the statute. [Citations omitted.] And where no cause of action is or can be shown on the facts alleged in the complaint so that no legally cognizable claim is stated, the complaint must be dismissed because it presents no substantial federal question. [Citation omitted.]" *Id.* at 916-17.

The court concluded that no substantial federal question was presented, and this conclusion formed the basis of the denial of the writ. The court then went on to buttress its dismissal: "In any event a three-judge court has no relation to habeas-corpus proceedings." [Cita-

tions omitted.] *United States v. Commonwealth of Pennsylvania, supra* at 917.

This case does not dispose of the issue herein presented for several reasons. Firstly, the rationale of the court's decision was based upon the failure of the habeas-corpus applicant to set forth a substantial federal question. The district court correctly concluded that this was a proper issue for determination by a single judge. The statement as to the non-applicability of the three-judge court to a habeas-corpus proceeding was strictly *dicta*. Secondly, a portion of the court's opinion preceding this statement of non-applicability is in direct conflict with this supposed holding. (The obvious difficulty which the court in this case had in handling this jurisdictional proposition is indicative of the confusion in this area.)

The decision in *United States v. York, supra,* placed complete reliance upon *United States v. Warden of Clinton Prison, supra,* and *United States v. Warden of Wallkill Prison, supra.* The opinion contained no independent consideration of the issue. At the same time, *United States v. Warden of Wallkill Prison, supra,* placed total reliance upon *United States v. Commonwealth of Pennsylvania, supra,* and *United States v. Warden of Clinton Prison, supra.* The authority to the effect that a three-judge court is not required quickly boils down to two reported decisions, one of which indicates some confusion, as previously discussed.

The basis for the holding that a three-judge court is not applicable to a habeas-corpus proceeding is found in this statement in *United States v. Warden of Clinton Prison, supra:* "Where the sole question is constitution-

ality, a single District Court Judge *seems* to have jurisdiction." *Id.* at 489 (Emphasis added.) As a result, it is simply impossible on the basis of the reported decisions to resolve the question or, for that matter, to determine where, if anywhere, the weight of authority rests.

The appellant is aware that the three-judge court requirement is subject to technical, strict construction in the interest of judicial regularity and economy. *Phillips v. United States,* 312 U.S. 246 (1941). At the same time, this construction will not be applied so as to distort or defeat the intended, congressional purpose. *Ibid.*

> "To bring this procedural device into place—to dislocate the normal operations of the system of lower federal courts and thereafter to come directly to this Court—requires a suit which seeks to interpose the Constitution against enforcement of a state policy, whether such policy is defined in a state constitution or in an ordinary statute or through the delegated legislation of an 'administrative board or commission.' The crux of the business is procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy. This was the aim of Congress and this is the reconcilable principle of the cases." *Phillips v. United States, supra* at 251.

At the same time, the large number of cases refusing to grant a request for a three-judge court, or approving the denial of such a request, have turned on issues not involved in this case.

Many claims for relief demanding a three-judge court pursuant to 28 U.S.C. § 2281 are subject to disposition by a single judge because of the claimant's failure to state a substantial federal question as to the constitutionality of a State statute. *Stewart v. Wilson,* 282 F.2d

539 (5th Cir. 1960); *Bell v. Waterfront Comm'n. of New York Harbor*, 279 F.2d 853 (2d Cir. 1960); *Carrigan v. Sunland Tujunga Tel. Co.*, 263 F.2d 568 (9th Cir. 1959). The authorization for such a single-judge disposition was originally introduced by *Ex Parte Poresky, supra*, and the inquiry became a mandate under *California Water Service Co. v. City of Redding*, 304 U.S. 252 (1938). A related train of decisions has upheld the action of a single judge with respect to the constitutionality of a State statute where the question has fallen clearly within the boundaries of a binding decision of the Supreme Court of the United States so as to preclude the existence of a substantial, terminable federal question. *Turner v. City of Memphis*, 369 U.S. 350 (1962).

Another exception to the three-judge requirement involves the attacks upon State statutes alleging conflict between the State statute and an enactment of Congress so as to raise a question under the supremacy clause. *Swift and Company, Inc. v. Wickham*, 382 U.S. 111 (1965). Such cases do not involve a conflict between the statute under attack and the federal Constitution. *Allen v. State Board of Elections*, U.S. 89 S.Ct. 817 (1969).

In light of the decision of the court below, there is hardly any room to contend that the present litigation does not involve a substantial question as to the constitutionality of a State statute. Certainly, the constitutional issue presented is more substantial than the "essentially fictitious" criteria laid down in *Bailey v. Patterson*, 369 U.S. 31, 33 (1962). The argument and citation of authority offered in support of issues 2 and 3

further illustrate the substantial nature of the federal constitutional question. The involvement of the opinion rendered by the court below further supports the appellant's contention that the suit as decided involved a substantial question as to the constitutionality of a State statute.

The appellant, a county official within the structure of Georgia law, is a State official as that term is used in 28 U.S.C. § 2281. See *Rorick v. Board of Commissioners*, 307 U.S. 208, 212-13 (1939). The effect of the decision of the court below was to prohibit the appellant from carrying out a policy of State-wide concern as embodied in a criminal statute of the State.

The problem area involves the nature of the relief sought and the theory of the appellee's action. The appellee did not pray for injunctive relief as such; however, here as in *United States v. Commonwealth of Pennsylvania, supra*, the complaining party sought to restrain State officers in the enforcement and execution of the State statute under which he was arrested, indicted, convicted and sentenced. Though not denominated an injunction, the relief decreed operates in injunctive fashion and its effect is to interpose the Constitution against enforcement of a State policy.

The legislative purpose underlying the three-judge requirement, as found by the Supreme Court in *Phillips v. United States, supra*, has already been set out. The action of the court below to which this appeal is directed is most obviously within the evil-remedy test of statutory applicability. See also *Swift and Co. v. Wickham*, 382 U.S. 111, 117-120 (1965); *Stainback v. Mo Hock Ke*

Lok Po, 336 U.S. 368 (1949); *Green v. Board of Elections of City of New York*, 380 F.2d 445, 449 (2d Cir. 1967) *cert. denied*, 389 U.S. 1048 (1968). See also Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U.Chi.L.Rev. 1 (1964).

Further, this is not a simple declaratory-judgment form of action. The order of the court below restraining the appellant in the enforcement, operation and execution of the statute under consideration is punishable within the contempt powers of the court. The order is injunctive in substance if not in form. All these factors considered together would seem to indicate that where an application for a writ of habeas corpus interposes a substantial question as to the constitutionality of a State criminal statute so as to call for a remedy restraining an official of the State in the enforcement, operation or execution of the statute under attack, the suit is to all intents and purposes an application for injunctive relief so as to require the convoking of a three-judge court.

2. A STATE CRIMINAL STATUTE PROSCRIBING THE UNPROVOKED USE TO OR OF ANOTHER PERSON, AND IN THE OTHER PERSON'S PRESENCE, OF OPPROBRIOUS WORDS OR ABUSIVE LANGUAGE TENDING TO CAUSE A BREACH OF THE PEACE IS NOT UNCONSTITUTIONAL FOR VAGUENESS OR OVERBREADTH.

The appellee, Wilson, in his application chose to launch an attack upon the constitutionality of a state statute based on alleged vagueness *and* overbreadth. While recognizing that this is now the commonly accepted mode for mounting constitutional offensives, the

appellant submits that the concept of overbreadth is more properly addressed to the first amendment protections while the concept of vagueness is a due-process consideration. Practice does not make perfect, and constitutional concepts would seem to be equally entitled to the integrity of their identity. This is especially true when the concepts are separately written upon the body of the Constitution by separate amendments entered at different times. Absent such a separation, sound analytical application of constitutional principles and concepts is ofttimes impossible. Unfortunately, the opinion which accompanied the order of the court below made no attempt to distinguish between the two concepts. Consequently, the matter of the alleged vagueness of the statute will necessarily have to be treated together with the alleged first-amendment deficiency. At the same time, the appellant requests the Court to consider the fact that two separate, important principles are involved.

Georgia Code § 26-6303 (1933) does not infringe upon or restrict protected speech; that portion of the section herein involved is a simple criminal statute directly related to that body of the law which defines and punishes the offense of assault and battery. Georgia Code § 26-1409 (1933) provides as follows:

> "On the trial of an indictment for an assault, or an assault and battery, the defendant may give in evidence to the jury any opprobrious words, or abusive language, used by the prosecutor, or person assaulted or beaten; and such words and language may or may not amount to a justification, according to the nature and extent of the battery, all of which shall be determined by the jury."

The obvious design of the statutory scheme is to avoid

personal violence and not to regulate public speech. A fair reading of the statute under attack indicates that it prohibits nothing more than the use of opprobrious and abusive words under circumstances which tend to cause shootings, stabbings, fisticuffs, and common affrays. It prohibits persons from engaging in conduct which constitutes a justification for a simple assault and battery. As such, it is not a political statute. Its provisions are not so broad as to prohibit or infringe upon even the most flaming political argument or debate, the object of which is to quicken the sense of the hearer and to move him to engage in a protracted expression of his own political philosophy.

The appellant recognizes that some statutes, notably those directed toward the control of political activity and advocacy, have been found to be unconstitutional where they have attempted to proscribe and make punishable the exchange of ideas and the advocacy without overt act of unlawful conduct. *Brandenburg v. Ohio*, 37 L.W. 4525 (U.S., June 9, 1969). These statutes, and the cases involving them, have been uniformly concerned with conduct which is political and which is embraced within the first amendment. Other decisions have dealt with situations where statutes have proscribed conduct broadly so as to sweep within the coverage of the statutory proscriptions conduct within the protection of the first amendment. *United States v. Robel*, 389 U.S. 258 (1967); *Keyishian v. Board of Regents of the University of the State of New York*, 385 U.S. 589 (1967); *Baggett v. Bullitt*, 377 U.S. 360 (1964). Unfortunately, some of these decisions are accompanied by opinions couched in the language of due process and

touching upon the void-for-vagueness doctrine; however, it is submitted that the thread of constitutional infirmity which links these decisions, and others of similar import, is the fact that the statute involved attempted to over-regulate protected first-amendment conduct. The question of overbreadth is truly a first-amendment question—one which can only be resolved by ascertaining the limitations of the proscription on conduct which the statute under attack sets forth and comparing this ascertained proscription with the protected areas of conduct.

The first amendment was not intended, and is not applied, to protect all speech, i.e., all verbal exercises. This is the clear, obvious teaching of the division between the Supreme Court majority and the concurring opinion writers in *Brandenburg v. Ohio, supra.* In fact, at the same time, there appears to be universal agreement that a major, if not the major, purpose of the first amendment is "to protect the free discussion of governmental affairs." *Mills v. Alabama,* 384 U.S. 214 (1966). It has been repeatedly recognized that the commitment of the first amendment is to the protection of the exchange of political and social ideas. Certain federal statutes which totally and absolutely prohibit speech in various forms have withstood assault launched from first-amendment bases. *Truchinski v. United States,* 393 F.2d 627 (8th Cir. 1968); *Spinelli v. United States,* 382 F.2d 871 (6th Cir. 1967); *Katz v. United States,* 369 F.2d 130 (9th Cir. 1966), *rev'd other grounds,* 389 U.S. 347 (1967); *United States v. Corallo,* 281 F.Supp. 24 (S.D.N.Y. 1968); *United States v. Kelly,* 254

F.Supp. 9 (S.D.N.Y. 1966); *United States v. Borgese*, 235 F.Supp. 286 (S.D.N.Y. 1964).

The Supreme Court has proclaimed on numerous occasions that freedom of speech is concerned with political and social exchanges, and the Court has expressly held that "the central commitment of the first amendment . . . is that 'debate on public issues should be uninhibited, robust, and wide open.'" *Bond v. Floyd*, 385 U.S. 116 (1966). An identical view of the first amendment is expressed in an earlier case holding that "the first amendment envisions that persons be given the opportunity to inform the community of both sides of the issues. . . ." *Wood v. Georgia*, 370 U.S. 375 (1962). The same factor is implicit in the Court's decision in *Brandenburg v. Ohio, supra*, and the cases therein cited.

Freedom of speech is not an absolute right. *Cox v. Louisiana*, 379 U.S. 559 (1965).

> "The Constitution does not establish an absolute right to free expression of ideas, though some might disagree. The constitutional right to free exercise of speech, press, assembly, and religion may be infringed by the State if there are compelling reasons to do so." *Ferrell v. Dallas Independent School Dist.*, 392 F.2d 697, 702 (5th Cir. 1968).

In declaring that obscenity is not protected by the first amendment, the Supreme Court held that:

> "The unconditional phrasing of the first amendment was not intended to protect every utterance. . . . The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 483-84 (1957).

Even the *Roth* dissenters expressed the thought that "freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it." *Id.* at 514. Cf. *Times Film Corp. v. Chicago*, 365 U.S. 43 (1961).

At this point, it seems proper to stop and examine again the Georgia statute under attack and to note, by a process of exclusion, what it does not purport to make punishable. It does not seek to punish the advocacy of an idea. *Brandenburg v. Ohio, supra.* The statute as drafted leaves one free to use abusive and opprobrious language to advocate the violent overthrow of our system of government, if that be the person's desire. It does not apply to abusive or opprobrious language utilized in the mere abstract teaching of the moral propriety or necessity for a resort to force and violence to effect political and/or social changes. It does not attempt to affect the mass dissemination of ideas by media or printed matter. A person is free, if that be his desire, to use opprobrious and abusive language in describing another person not in the presence of the person so described. The speaker may even use opprobrious and abusive language to or about another person in his presence provided, of course, that the use of the language under the circumstances does not tend to a breach of the peace. As viewed, the statute is not designed to regulate social or political commentary and activity.

The first amendment protects the freedom of assembly; however, it does not protect assemblage which is incidental to, and a part of, a punishable conspiracy. In the present case, we are concerned with the statute which on its face does not attempt to regulate advocacy,

instigation or incitation. Rather, it deals solely with face-to-face provocation. The appellant submits that the first amendment's protection of free speech was never intended to clothe a person in immunity who by use of words to and in the face of another person intentionally provokes that other person to acts of violence *against* the speaker. Such an extension of the first amendment would not be in line with ordered concepts of civilized democracy; rather, it would necessarily tend toward a disorderly, bawdy and violent social structure.

The States have a legitimate interest in prohibiting the use of abusive and opprobrious words which tend to provoke violent, immediate, physical affrays. The common need of all citizens, including those who desire to engage in peaceful expressions of their political views, to live in a society in which free and robust political debate is a meaningful concept is a compelling reason, within the meaning of the Fifth Circuit's decision in *Ferrell, supra*, for the States to restrict the use of abrasive language which tends to provoke others to the commission of immediate, physical violence. Stirring the listener to action by a heated debate, a coolly logical speech, or even a wildly emotional harangue is an acceptable practice and a constitutionally protected right. But, deliberate provocation of killing or violence—acts to which the Georgia statute is addressed—has not enjoyed historical acceptance in this country. Even debate or speech-making, designed to move the listener to constructive, albeit loud, political action cannot survive in a community which is impotent to prevent a man from deliberately triggering physical outbursts.

An examination of the Supreme Court's opinion in

Brandenburg v. Ohio, supra, will furnish a very adequate vehicle for illustrating the operation of the statute under attack. In footnote 1 of the Court's per curiam opinion there were set forth various phrases derogatory of negroes and Jews. According to the opinion, these phrases were clearly understandable from the sound track of a sound motion-picture film taken at a Ku Klux Klan rally in Ohio. This film had been introduced into evidence against the defendants who had staged the rally in a prosecution under the Ohio Criminal Syndicalism statute, Ohio Rev. Code ¶ 2923.13. By derivation, it is not difficult to imagine and picture the situation were any one of these phrases to be used in a direct face-to-face confrontation with an ordinary member of the class thereby degraded. The situation is not one then of mere advocacy of an idea nor the communication of thoughts. In such a circumstance the words, many of which are obviously opprobrious, and the language, much of which is clearly abusive, constitute a provocation to physical conflict. Under the laws of Georgia, as previously pointed out, they could well be found to constitute a justification for an assault by the demeaned person upon the speaker. The State of Georgia submits that the first amendment was never intended and has never been applied to negative the police power of the States to make punishable such deliberate provocations. There is simply nothing in any majority opinion of the Supreme Court in the area of first-amendment rights which indicates that the States are helpless and powerless to proscribe what in effect amounts to a verbal assault.

The shaking of a fist by a speaker in the advocacy of an idea may under certain constructions of the first amendment be protected, symbolic free speech, but none

of these theories would go so far as to say that the belligerent shaking of the fist under the nose of another person is not conduct which the States may punish. Yet, it is but a small step from the decision of the court below to a decision striking down simple assault statutes on the ground that they contravene the first amendment.

Additional support for the statute's constitutional validity can be found in the continuing vitality of the clear-and-present-danger limitation on first-amendment freedoms. *Brandenburg v. Ohio, supra.* It is possible that this limitation has by virtue of a footnote in the *Brandenburg* majority opinion been relabeled the "tendency to produce forcible action" limitation. *Brandenburg v. Ohio, supra* at 4526, n. 2. In either case, the Georgia statute is within the limitation.

It is to be noted that the statute under attack does not proscribe the use of language tending to a breach of the peace; rather, it proscribes the use of such language *to and of another person and in his presence* tending to a breach of the peace. We only need to reimagine the illustrations conveyed by the *Brandenburg* decision to realize the extreme importance of this difference in testing the statute under the first amendment. Certainly, it cannot be said that the Georgia statute does anything more than proscribe language fully and completely related to its tendency to produce forcible action. Again, it is impossible to construe the Georgia statute as being applicable to the mere advocacy of an idea.

For these reasons, and in light of the foregoing discussion, the State of Georgia submits that its statute which the court below declared unconstitutional does not by its language breach protected first-amendment

liberties. Provoking a fight, whether it be by "getting in the first lick" or by using abrasive language is criminal conduct. Criminal conduct per se does not enjoy first-amendment protection. While the Supreme Court has considered principally first-amendment rights in the context of political rights, the lower federal courts have had occasion to declare that the freedom-of-speech principle is inapplicable to per se criminal conduct. *United States v. Borgese, supra.* "While the first amendment provides freedom of speech, it does not guarantee or protect criminal conduct." *United States v. Smith,* 209 F.Supp. 907, 919 (E.D. Ill. 1962). The sweeping statements of these cases are not incompatible with standards enunciated by the Supreme Court. The Fifth Circuit's recognition of "compelling reasons" to inhibit the totally free exercise of speech is certainly not at variance with standards proclaimed by the Supreme Court. *Ferrell v. Dallas Independent School Dist., supra.*

The State of Georgia submits that provoking a fight is a common crime and that such provocations are not shrouded under the mantel of the first amendment. Provoking a blow with the fist or the retort of a pistol has never been, and should not now be, equated with provoking those mental processes which lead to a useful social and political change. The appellant submits that a careful reading of Ga. Code § 26-6303 reveals that the statute does not infringe upon constitutionally protected speech. It is simply a statute prohibiting the precipitation of unprotected, illegal physical violence. Therefore, the State submits that the statute is not overly broad, as claimed by the appellee. There is no constitutional right to provoke and precipitate civil war.

whether there be tens or hundreds of participants, or merely two individuals swinging their fists at one another.

3. A STATE STATUTE PROSCRIBING THE UNPROVOKED USE TO OR OF ANOTHER PERSON, AND IN THE OTHER PERSON'S PRESENCE, OF OPPROBRIOUS WORDS OR ABUSIVE LANGUAGE, AND INTERPRETED BY THE COURTS OF THE STATE AS PROHIBITING OPPROBRIOUS WORDS AND ABUSIVE LANGUAGE "LIKELY TO CAUSE A BREACH OF PEACE" OR "WHICH WOULD NATURALLY TEND TO CAUSE A BREACH OF PEACE UNDER ORDINARY CIRCUMSTANCES", IS NOT UNCONSTITUTIONALLY VAGUE AND OVERBROAD AS INTERPRETED BY THE COURTS OF THE STATE IN QUESTION.

While the constitutional cornerstones of alleged vagueness and overbreadth have been placed in close juxtaposition, the concepts represented by the two words are not necessarily allied, for a statute could employ words of precise and definite meaning to intrude upon an area substantively protected by the Constitution. On the other hand, a statute could employ vague and imprecise words raising procedural due-process questions, and still not be overly broad because of its lack of infringement upon a substantive constitutional provision.

A differentiation between the concepts of vagueness and overbreadth should be drawn in this case for two principal reasons. Firstly, the Georgia statute is neither

vague nor overly broad. Secondly, the two concepts are not mutually inclusive, and the doctrines represented should not be mingled and allowed a degree of interplay which would permit each of the diverse concepts to come in aid of the other.

Implicit in the appellee's claim of vagueness is the contention that he, as an individual of at least ordinary intelligence, cannot understand the statute, for "the concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication." *Landry v. Dailey*, 280 F.Supp. 939, 951 (E.D. Ill. 1968).

The overbreadth claim necessarily rests upon a contention that the statute infringes upon a substantive right specifically granted by the Constitution. In drawing the distinctions between the legal concepts of vagueness and overbreadth, the three-judge court in *Landry, supra*, pointed out that "the concept of overbreadth . . . rests on principles of substantive due process which forbid the prohibition of certain individual freedoms." *Landry v. Dailey, supra* at 951. Having previously shown that the statute is not overly broad so as to prohibit substantively protected first-amendment exercises, the appellant now turns to the due-process claims, including the appellee's first-amendment "vagueness" claims.

The Georgia statute is plain on its face. As such, the statute does not really require judicial construction, as its meaning is clear without interpretation. In examining a statute, a court should accord it a normal and ordinary construction as indicated by the words employed by the legislative draftsmen. The standard to be

used is whether the statute gives "a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." *United States v. Harriss*, 340 U.S. 612, 617 (1953). The words employed in a statute generally have the meaning ordinarily ascribed them by "men of common intelligence." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942). For an additional detailed discussion of this general area, see Quarles, *Some Statutory Construction Problems and Approaches in Criminal Law*, 3 Vand.L.Rev. 531, 539-43 (1950).

In disposing of the alleged due process deficiencies in the statutes involved in the now famous *Roth* and *Alberts* obscenity cases, the Supreme Court held that

> "... [T]he Constitution does not require impossible standards; all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by *common understanding and practices*.' ..." *Roth v. United States*, 354 U.S. 476, 491 (1957). (Emphasis added.)

Just as the citizens of the United States were held to recognize the conduct forbidden by the obscenity statutes involved in the *Roth* and *Alberts* cases, men of common understanding know, without being told by the General Assembly of Georgia, that the expression of some thoughts under particular circumstances is highly likely to produce a black eye or a broken nose. This obvious truth has received judicial recognition and application. *Chaplinsky v. New Hampshire*, *supra* at 573. The Georgia statute does not forbid "conduct in terms so vague that men of common intelligence must necessarily 'guess' at its meaning and differ as to its ap-

plication. . . ." *Baggett v. Bullitt, supra.* See also *Cramp v. Board of Public Instruction of Orange County, Florida,* 368 U.S. 278, 7 L.Ed.2d 285 (1961).

The appellant submits that the statute more than adequately meets due-process requirements and that it is not overly broad. While this may be discerned from a reading of the statute, it is unnecessary to indulge in speculation concerning its application; as numerous cases have reached the appellate courts of Georgia requiring the application of Ga. Code § 26-6303. The standard, prevailing rule of statutory construction was early applied to the language of this section. *Stevenson v. State,* 90 Ga. 456, 458 (1892). Consequently, the phrase "opprobrious words or abusive language" is to be taken in the ordinary sense conveyed by the words.

In determining the ordinary sense of words, reference to a standard, accepted dictionary has been judicially approved. *United States v. Strong,* 263 F. 789, 796 (W.D. Wash.). Thus, "abusive" is synonymous with coarse, insulting, words. Webster defines "abusive" as "given to or tending to abuse". "Abuse" is by Webster defined as "vituperative words; coarse, insulting speech; abusive language; virulent condemnation; reviling." The same authoritative source defines "opprobrious" as being expressive of opprobrium (reproach, disgrace, contempt, infamy, reprobation), as attaching disgrace, as being reproachful and/or scurrilous. Opprobrious language is disgraceful, abusive, insulting, offensive, scurrilous, gross and vulgar. Thus, opprobrious has been judicially defined as meaning reproachful, scurrilous, infamous. *Behling v. State,* 110 Ga. 754, 755 (1900); *Dillard v. State,* 41 Ga. 278, 281, 282 (1871). The term "abusive and

opprobrious language" contemplates words conveying contempt and insult. *Behling v. State, supra.* Similar definitive concepts have been applied in other states. See *Peters v. State,* 51 So. 952, 953 (Ala. 1910); *State v. Pope,* 96 A. 313, 314 (Conn. 1916); *People v. Sinclair,* 149 N.Y.Supp. 54 (Gen. Sess. 1914).

It is important to note that the Georgia statute under attack does not prohibit the use of abusive language and opprobrious words. Considerably more is required in order for conduct to become punishable under the statute. "Proof of the use of opprobrious words alone is not sufficient, without showing the circumstances or in any way proving want of provocation." *Fuller v. State,* 72 Ga. 213 (1883), approved *Hardin v. State,* 114 Ga. 58 (1901). See also *Fish v. State,* 124 Ga. 416 (1905).

> "We cannot think that the legislature was aiming solely at the words, without reference to the thoughts or idea the words are intended to convey. There is not a single word in the language, however coarse, low or vulgar, that may not be and is not often used to convey proper and decent ideas, and it is a mawkish and really an indelicate and immodest sensitiveness that blushes at a word which may be used obscenely, but which the occasion and the context shows not to be so used. Words get their point and meaning almost entirely from the time, place, circumstances and intent with which they are used, and it seems to us a very unfair interpretation of this clause of the Code to say, that it is directed simply against the use of certain words which are by common consent banished from decent society. If there are any such words in our language they are very few, and as we have said, they are only obscene and vulgar accordingly as they convey obscene and vulgar ideas.

> "This statute does not stand upon the footing of statutes against public indecency. Its object is not to keep pure the public morals. It is to be found in that chapter of the Code which punishes private wrongs, and *forms a part of the same clause which makes it a penal offense to use opprobrious and abusive language to another.*" *Dillard v. State, supra* at 281. (Emphasis added.)

While this particular appellate decision dealt with a conviction for using obscene language to a female, it is clearly expressive of the uniform judicial construction which has been placed upon the entire section insofar as it proscribes various verbal expressions.

In every prosecution involving the statute under attack, a mixed question of fact and law is whether the alleged words were likely to cause a breach of the peace. *Jackson v. State*, 14 Ga. App. 19 (1913). Further, the statutory language relating to the tendency to breach of peace has been adequately construed by the Georgia courts so as to define the situation within which the use of abusive and opprobrious language, as commonly understood, is prohibited. *Elmore v. State*, 15 Ga. App. 461 (1914); *Jackson v. State, supra*. This portion of the statute has been construed as "likely to cause a breach of peace," or, in other words, language "which would naturally tend to cause a breach of peace under ordinary circumstances." *Ibid.*

In addition to the cases already cited, the statutory prohibition has been construed and applied to particular situations in a number of reported, appellate-level decisions. *Wiggins v. State*, 17 Ga. App. 748 (1916); *Porter v. State*, 86 Ga. 362 (1896); *Meaders v. State*, 96 Ga. 299 (1895); *Ratteree v. State*, 78 Ga. 335 (1886).

The thrust of these decisions illustrates the fact that, as construed by the Georgia courts, the statute in question is not applied to regulate speech. It is not a statute enforcing any concept within the general view of public morals. Instead, it falls within the area of those statutes designed to further the State's domestic peace-keeping function. Under the statute as construed, a person is free to utilize abusive language and opprobrious words so long as he does not utilize those words in a contextual situation where, under ordinary circumstances, the natural effect of the language would be to cause a breach of the peace. Just as one is not free to cry "fire" falsely in a crowded theater, one is not free, however naturally coarse, abusive and opprobrious he might be, to use abusive language and opprobrious words to and of another, and in the other's presence, in a situation where, under normal and natural circumstances, a breach of the peace is thereby likely to be caused.

This same statute was under similar attack in *Wilson v. State*, 223 Ga. 531 (1967). The judgment of the Supreme Court of Georgia in the *Wilson* case was undisturbed upon an application for a writ of certiorari. While denials of writs of certiorari by the United States Supreme Court may not be "binding", the recent history of the operation of that Court indicates that such denials should not be lightly regarded, as it is the practice of that Court to be somewhat less than parsimonious in its grants of writs. In the *Wilson* case, the certiorari to the Supreme Court of Georgia did not commend itself to the consideration of four Justices, although Asso-

ciate Justice Douglas thought that the writ should be granted. 36 L.W. 3298 (U.S. 1968).

The appellant submits that the interpretations placed upon the statute by Georgia appellate courts adequately demonstrate the narrow range within which the statute operates. It is well to emphasize that as construed no less than four distinct elements must be present in order to sustain a conviction under the section in question. Firstly, there must be abusive language or opprobrious words, as the same is commonly understood. Secondly, these words or this language must be used to or of another person. Thirdly, the remarks must be made in the immediate, direct presence of the person either to whom it is addressed or of whom it has reference. Fourthly, the entire situation in which the words are spoken must, under normal circumstances, cause the conduct of speaking so as to make this conduct likely to cause a breach of the peace. Taken together these four elements outline a proscription of provocative, assaultive conduct which it is clearly within the police power of the States to prohibit.

The latest decisions of the United States Supreme Court continue to reaffirm the proposition that first-amendment rights are related to political activities and not to mere criminal conduct. "Speech and press are, of course, to be free, so that *public matters can be discussed* with impunity." *Gregory v. Chicago*, 37 L.W. 4213, 4217 (U.S. 1969). The Court recognizes that men's homes can be protected "from noisy, marching, tramping, threatening picketers and demonstrators bent on filling the minds of men, women, and children with fears of the unknown." *Gregory v. Chicago*, *supra* at

4217 (JJ. Black and Douglas concurring). If the minds of men may be protected from the communication of "fears of the unknown", the appellant submits that there can be no question that overt and assertive offers of violence (constituting known fears) may be prohibited."

In dealing with Ohio's criminal syndicalism statute, the Supreme Court noted that the statute failed to distinguish between mere teaching of violence and "preparing a group for violent action and steeling it to such action." *Brandenburg v. Ohio*, *supra* at 4526. In striking down the statute, the Court said that there was no narrowing State construction of the definition of the crime "in terms of mere advocacy not distinguished from incitement to imminent lawless action." *Ibid.* The *Brandenburg* Court said, in effect, that a statute may not forbid mere advocacy. That proposition is unquestioned. The Court did not leave the matter there. It said, at least inferentially, that a statute prohibiting speech which incites "to imminent lawless action" is permissible. The Georgia statute prohibits abusive and opprobrious speech "tending to cause a breach of the peace". There is neither logical nor legal difference between the concepts represented by the words "tending to cause a breach of the peace" and "incitement to imminent lawless action".

The most recent case known to counsel involving the speech-violence concept — which is the heart of this case — is a prosecution undertaken in the District of Columbia in which the defendant was charged with using "profane * * * words under circumstances tending to breach of peace did congregate * * * and refuse to move

on * * *." *Williams v. District of Columbia*, 5 Cr.L. 2268 (D.C. Cir. June 20, 1969). The United States Court of Appeals for the District of Columbia Circuit, in reversing *en banc* a panel decision, held that the section of the District of Columbia Code "would not be invalid if the statutory prohibition against profane or obscene language in public were interpreted to require an additional element that the language be spoken in circumstances which *threaten a breach of the peace*. And for these purposes a breach of the peace is threatened either because the language creates a substantial risk of provoking violence, or because it is, under 'contemporary community standards' so grossly offensive to members of the public who actually overhear it as to amount to a nuisance." *Williams v. D. C., supra*.

Although the accusation in the *Williams* case alleged that the words were spoken under circumstances tending to cause a breach of the peace, unfortunately, the District of Columbia Code did not include "tending to cause a breach of the peace" as an element of the offense. The draftsmen of Georgia's statute specifically included the words "tending to cause a breach of the peace" as an element of the Georgia offense.

Georgia's statute does not ensnare the political speaker. It simply and adequately prohibits the deliberate provocation of a fight. It is a simple criminal statute which, while it deals with verbal conduct, has no other reasonable nexus with the first amendment.

CONCLUSION

For each of the foregoing three reasons, the appellant submits that the decision of the court below holding Ga. Code § 26-6303 (1933) unconstitutionally vague and overbroad was in error and should be reversed.

It is submitted that the decision of the District Court was in excess of the jurisdiction of a single-judge court. In addition, it misapplied the decisions of this Court to strike down a State criminal statute of State-wide import. It is submitted that the questions presented by this

appeal are substantial and that they are of public importance.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHNNY C. WILSON vs. MILLARD GOODING, Warden of the Richmond County, Georgia, Public Works Camp	CIVIL ACTION NUMBER 12511

In this writ of habeas corpus petitioner seeks to set aside his conviction on a number of grounds. The Court, in an order dated March 4, 1969, concluded that petitioner had not exhausted his available state remedies as to contentions raised in paragraphs 6b, 7, 8, and 9 of the writ. The Court concluded that petitioner had exhausted his remedies as to the contention raised in paragraph 6 and 6(a), attacking his conviction on the grounds of the alleged unconstitutionality of Georgia Code §26-6303. The Court also concluded that petitioner's failure to utilize a direct appeal to the United States Supreme Court under 28 U.S.C. §1257 did not constitute a bar to this proceeding. Accordingly, this order will not deal with the alleged unconstitutional application of this statute nor any of the other points raised in the writ, except for the facial unconstitutionality of Georgia Code §26-6303.

Georgia Code § 26-6303 provides in relevant part:

> Any person who shall, without provocation, use to or of another and in his presence opprobrious words or abusive language, tending to cause a breach of the peace . . . shall be guilty of a misdemeanor.

The question of constitutionality of this statute is exceedingly complex and difficult. None of the reported cases that have come to this Court's attention have dealt with the precise issues presented herein, yet many cases have dealt with at least some aspects of the instant statute. First Amendment rights have assumed a protected place in our jurisprudence. Great care must be taken in this area to assure that vague or overbroad laws do not infringe upon these rights. See, e.g., Ashton v. Kentucky, 384 U.S. 195 (1966); Dombrowski v. Pfister, 380 U.S. 479 (1965). Since speech is normally intended to change the opinion or reinforce the opinions of others, problems arise as to the extent to which speech may be curbed when it provokes others into action. The cases reflect the view that peaceful expression of even unpopular views is permitted and even encouraged.

> [illegible] of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech . . . is . . . protected against censorship or punishment, unless shown likely to produce a clear and present dan-

> get of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.

Terminiello v. Chicago, 337 U.S. 1, 4-5 (1948). In a recent decision the Supreme Court has taken a further step in elaborating upon the above language:

> [T]he constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing lawless action and is likely to incite or produce such action. As was said in Noto v. United States, 367 U.S. 290, 297-298 (1961), "the mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action." See also Herndon v. Lowry, 301 U.S. 242, 258-261 (1937); Bond v. Floyd, 385 U.S. 116, 134-135 (1966).

The decision in Brandenburg v. State of Ohio, 37 U.S.L.W. 4532 (June 9, 1969), logically followed from the Court's earlier decisions in Yates v. United States, 354 U.S. 298 (1957); Delonge v. Oregon, 299 U.S. 353 (1937); Stromberg v. California, 283 U.S. 359 (1931). But a speaker passes the bounds of argument and persuasion and undertakes incitement to riot. See, e.g., Feiner v. New York, 340 U.S. 315 at 321 (1950). The above distinction, while easily stated, is not so easily applied to a given factual situation. What is clear, however, is the fact that the Supreme Court will not allow intrusions into this protected area.

> For standards of permissible statutory vagueness are strict in the area of free expression. Because First Amendment freedoms need breathing space

to survive, government may regulate in the area only with narrow specificity

N.A.A.C.P. v. Button, 371 U.S. 415 at 432-33 (1963). Thus, in *Ashton* v. *Kentucky*, *supra*, the Court struck down a statute prohibiting "... any writing calculated to create disturbances of the peace ..." In Terminiello v. Chicago, 337 U.S. 1 (1949), the Court struck down an ordinance ~~forbidding any~~ "breach of the peace" where the trial judge instructed the jury that any misbehavior which "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance" violated the ordinance. Clearly, a statute may not involve "calculations as to the boiling point of a particular person or a particular group," but must involve "an appraisal of the nature of the commence *per se*." *Ashton* v. *Kentucky*, *supra* at 200. Numerous other decisions have overturned breach of the peace statutes and related statute where the offense was improperly or imprecisely defined. See, e.g., Edwards v. South Carolina, 372 U.S. 229 (1963); Cox v. Louisiana, 379 U.S. 536 (1965); Hunter v. Allen, 286 F. Supp. 830 (N.D.Ga. 1968); University Committee to End The War In Viet Nam v. Conn, 289 F. Supp. 469 (W.D. Tex. 1968); Baker v. Bindner, 274 F. Supp. 638 (W.D.Ky. 1967); Ware v. Nichols, 266 F. Supp. 364 (N.D. Miss. 1967); Carmichael v. Allen, 267 F. Supp. 985 (N.D. Ga. 1967).

In *Cantwell*, supra, the Court noted

> [I]t takes no elaboration to demonstrate that the term 'vulgar' in connection with 'language', and the use of the term 'tending to disturb the good order, morals ... or dignity of the City' leaves the executive and judicial branches too wide a discretion in the application of the law. It too

Having generalized as to the legal background in this area, the Court is now faced with a decision as to the constitutionality of Georgia Code §26-6303. Defendant argues that the phrases "opprobrious words" and "abusive language" have a well defined meaning in the Georgia law and are not so broad as to impinge upon protected areas. In construing this code section the Courts have held that the words of the enactment are to be taken in their ordinary signification. Stevenson v. State, 90 Ga. 456 (1892). The Georgia Courts have definitely established grimaces or facial expressions of contempt do not constitute "opprobrious words or abusive language." Belding v. State, 110 Ga. 754 (1900). In Fisk v. State, 124 Ga. 416 (1905), the Court reversed a trial judge's instructions that as a matter of law certain words were opprobrious and abusive, stating that this as well as whether it was calculated to cause a breach of the peace were questions for the jury. This holding appears to be contrary to the holding of the Georgia court in the instant case that the words used by the petitioner were opprobrious and abusive per se. Again in Jackson v. State, 14 Ga. App. 19 (1913), the court stated that this was a question for the jury, but again

failed to define these terms. The decision in Dillard v. State, 11 Ga. 278 (1870) deals only with the provision as to the use of obscene or vulgar language in the presence of a female. Thus, in the decisions brought to this Court's attention, no meaningful attempt has been made to limit or properly define these terms. Some courts have approved reference to a standard dictionary to define statutory terms. *E.g.* United States v. String, 264 F. 789, 796 (W.D. Wash.). According to Webster's New International Dictionary (2d Ed. 1941), opprobrious means "Expressive of opprobrium; attaching disgrace; reproachful; scurrilous . . . ." Synonyms include "disgraceful, abusive, insulting, offensive." The same work lists as synonyms for insulting, the terms "insolent and offensive." Thus, in the dictionary sense of these phrases, they both include the words that are offensive, thus arguably encroaching upon the mandates of *Brandenburg*, *supra*; *Talley*, *supra*; and *Terminiello*, *supra*. There is dicta in Cantwell v. Connecticut, 310 U.S. 296 (1940) that certain epithets "profane and indecent in nature" would not be protected. The case of Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) suggests that "fight ing words" may result in punishment. Moreover, this Court does not see any policy reasons for upholding the right of a person to use the type of language exhibited by the petitioner. It strains the concept of freedom of speech out of proportion when it is argued that

However, the police courts have thus far failed to provide a precise practical remedy. Such expression is regarded at the lower courts are to be continually called upon to inquire into the validity of similar state statutes and local ordinances. Cantwell v. Connecticut, 310 U.S. 296 (1940) gives the most likely basis under which it is still valid.

such language is and should be protected. However, this consideration is really not relevant to the present inquiry, except to suggest that a narrowly and precisely defined statute could have reached this sort of speech. The fault of the statute is that it leaves wide open the standard of responsibility, so that it is easily susceptible to improper application. The State argues that the statute is saved by the adding requirement of "tending to breach the peace." This is a persuasive argument until one reads the decision in *Ashton v. Kentucky*, *supra*, wherein the Court states in reference to *Edwards v. South Carolina*, *supra*, and *Cox v. Louisiana*, *supra*:

> These decisions recognize that to make an offense of conduct which is "calculated to create disturbances of the peace" leaves wide open the standard of responsibility.

Id. at 200. Moreover, in *Cox v. Louisiana*, *supra*, at 551, the Court struck down as unconstitutionally vague and broad a statute including as an element the congregating with others "with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace, or under circumstances such that a breach of the peace may be occasioned." As construed by the Georgia courts, especially in the instant case, the Georgia provision as to breach of the peace is even broader than the Louisiana statute.

Thus, the Court must conclude that Georgia Code 26-6301 is unconstitutionally vague and broad, and the conviction thereof is set aside.

That portion of defendant's confinement attributable to a conviction under this statute must necessarily fall.

IT IS SO ORDERED

This the 7th day of July, 1969.

Stanley O. Smith Jr.

Stanley O. Smith Jr.
United States District Judge

APPENDIX B

26-1409. (1913 p. 67.) *Opprobrious words as defense; question for jury.* On the trial of an indictment for an assault, or an assault and battery, the defendant may give in evidence to the jury any opprobrious words, or abusive language, used by the prosecutor, or person assaulted or beaten, and such words and language may or may not amount to a justification, according to the nature and extent of the battery, all of which shall be determined by the jury. (Cobb, 841.)

26-6103. (1887 p. 67.) *Using abusive, or obscene language.* Any person who shall, without provocation, use to or of another, and in his presence, opprobrious words or abusive language, tending to cause a breach of the peace, or who shall, in like manner, use obscene and vulgar or profane language, in the presence of a female, or any person who shall communicate to any virtuous female within this State by writing or printing any obscene or vulgar language or improper proposals, or by indecent or disorderly conduct in the presence of females on passenger cars, street cars, or other places of like character, shall be guilty of a misdemeanor. (Acts 1866-6, p. 233, 1872, p. 9, 1878, p. 28, 1890-1, p. 83, 1919, p. 103.)

CERTIFICATE OF SERVICE

I, Marion O. Gordon, one of the Attorneys for Appellee herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 11th day of September, 1969, I served a copy of the foregoing Jurisdictional Statement on the Appellant by mailing copies of the same in duly addressed envelopes with postage prepaid to his counsel HOWARD MOORE, JR., and PETER F. RINDSKOPF, 859½ Hunter Street, N.W., Atlanta, Georgia

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